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Division Bench (Criminal)

In the High court of Judicature at Jabalpur (M.P.)

C.RI. Appeal No. 2173 / 2000.

Appellant accused : Umesh @ Kailash Mahajan son of Balwant Mahajan, aged about 32 years, resident of Llalganj Nagpur, Now r/o Mangal Bazar, Gudiari, Raipur.

versus.

Respondent : State of M.P.

Criminal appeal under section 374(2) Cr.P.C.

(3)

18/Dec.
A.J. Mukherjee
Advocate

MA 2)

XI-HC-78

(31)

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक G.A.2173/ **सन् 2000**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench: -

Hon'ble Mr. L.C. Bhadoo, Ag.C.J. and
Hon'ble Mr. Sunil Kumar Sinha, J.

4-1-2007

Mr. Vijay Deshmukh, counsel for the appellant.

Mr. U.N.S. Deo, Additional Public Prosecutor with Mr. D.K. Gwalre, Deputy Govt. Advocate for the State/respondent.

Oral judgment dictated on *Dais.*

Per L.C. Bhadoo, Ag.C.J: -

This appeal is directed against the judgment of conviction and order of sentence dated 31-1-2000 passed by the 1st Additional Sessions Judge, Raipur, in Sessions Trial No.25/99, whereby learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Section 302 of the I.P.C. sentenced him to undergo imprisonment for life and pay a fine of Rs.2,000/-, in default of payment of fine to further undergo R.I. for one year.

The case of the prosecution, in brief, is that deceased Bharti was married to the accused and there were two children one boy & one girl out of the wedlock. As there was continuous dispute between the husband and wife, as a result of which the deceased started residing with her parents. Thereafter, again the accused took Bharti to his residence. However, on account of the dispute, she again started residing with her parents in Gudhiyari. She was working in Sagar Collection. On the fateful day i.e. 15-7-

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

1998, when she was returning to house after attending her duty, accused Umesh @ Kailash Mahajan met her on the way and asked her to come along with him to his house to which the deceased refused and the accused followed her up to her house. They entered the room, there the accused again asked her as to whether she will reside with him or not on which she replied in negative. At that time, mother of the deceased came and started knocking the door. When the deceased moved towards the door for opening it, then the accused pushed her in the room, caught hold of her and attacked with a knife 5-6 times. As mother of the deceased was knocking the door, Raja, son of the deceased, came to open the door and then after seeing the condition of his mother, Raju started weeping and in the mean time, the deceased became unconscious. Harish Mallewar (PW-1), brother of the deceased, also came on the scene and saw the accused attacking his sister Bharti.

Thereafter, the matter was reported to the Police under Dehati Nalishi Ex.P-1 and based on that the Station House Officer, Police Station: Gudhiyari registered the crime under Ex.P-10 for the commission of offence under Section 307 of the I.P.C. and left for the scene of occurrence. Injured Bharti was sent to the hospital where Dr. R.K. Pandey (PW-4) examined the injuries of Bharti and noticed as many as five incised wounds and prepared the injury report Ex.P-6. Thereafter, injured Bharti was referred to the Surgery Department where she was operated upon by Dr. P.L. Yadu (PW-10). As per the evidence of Dr. P.L. Yadu, spleen of Bharti was damaged, diaphragm was damaged, her spleen was removed by operation and ultimately, she died in the hospital on 10-8-1998 during treatment. Merg intimation was sent to the Police

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Station on which the offence was converted into Section 302 of the I.P.C. Post-mortem was conducted by Dr. Sanjay Kumar Dadu (PW-7) who prepared the post-mortem report (Ex.P-12) and he opined that the death was due to cardio respiratory failure as a result of stab injury and its complications. During Police custody, the accused gave memorandum Ex.P-5 regarding knife, the weapon of offence, and in pursuance of that, the knife was taken into possession under Ex.P-4. The Investigating Officer after giving notice Ex.P-8A to the Panchas, prepared the inquest (Ex.P-9) on the body of deceased Bharti Mahajan. The recovered articles were sent for chemical examination to the Forensic Science Laboratory, Raipur, from where the report Exs.P-21 & P-22 were received.

After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Raipur, who in turn committed the case to the Sessions Judge, Raipur from where learned 1st Additional Sessions Judge, Raipur received the case on transfer for trial.

The prosecution in order to establish charge against the accused examined ten witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the material appearing against him in the prosecution evidence and stated that on the fateful day, he was at Nagpur and Bharti took divorce from him, he has been falsely implicated in the crime.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Learned Additional Sessions Judge after hearing counsel for respective parties as also after perusal of the record, convicted and sentenced the accused as aforementioned.

We have heard Mr. Vijay Deshmukh, learned counsel for the appellant and Mr. U.N.S. Deo, learned Additional Public Prosecutor with Mr. D.K. Gwalre, learned Deputy Govt. Advocate on behalf of the State/respondent.

Mr. Deshmukh, learned counsel for the appellant, has not disputed the homicidal death of Bharti. Apart from that, from the ocular evidence of Harish Mallewar (PW-1) & Raja Mallewar (PW-2), as also the medical evidence of Dr. Sanjay Kumar Dadu (PW-7) & Dr. P.L. Yadu (PW-10), it is established that the death of Bharti was homicidal in nature.

As far as involvement of the accused/appellant in the crime in question is concerned, conviction rests primarily on the evidence of Harish Mallewar (PW-1) & Raja Mallewar (PW-2) who said to have witnessed the crime in question. Harish Mallewar (PW-1) has stated in his evidence that on the fateful day, in the evening, Bharti was returning from duty to her residence, accused Kailash also came following her, he was in drunken condition, he took her in a room on the ground floor and attacked her with a knife. When he reached in the room, last assault was being made by the accused. Raja & Monica were already there, on hearing their screams, he came down and saw the incident. The last assault was made on the head of Bharti. Raja Mallewar (PW-2), son the deceased and the accused, aged about 7 years, has also stated in his evidence that his parents used to quarrel with each other, on the date of

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक / आदेश क्रमांक	हस्ताक्षर सहित आदेश —5—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

incident he was residing with his maternal uncle, he heard the screams of his mother from the room of ground floor, he came down, thereafter, his maternal uncle also came down, his father was attacking his mother with the knife. In cross-examination of these two witnesses, defence has not been able to elicit any circumstance, which discredits the evidence of these witnesses. Moreover, knife, the weapon of offence was recovered at the instance of the accused under Ex.P-4. Learned counsel for the appellant was not able to argue any point to show that on the basis of the evidence of these two witnesses the prosecution has not been able to establish involvement of the accused in the crime in question. The accused in his statement under Section 313 of the Cr.P.C. gave a false explanation that on the date of incident he was at Nagpur, whereas, these two witnesses have categorically stated that they saw the accused in the room of their house attacking Bharti, as such, for the foregoing reasons, we are of the considered opinion that the prosecution has been able to establish involvement of the accused in the crime in question beyond reasonable doubt.

Learned counsel for the appellant argued that in this case, the incident happened in the night of 15-7-1998, whereas, Bharti died on 10-8-1998 i.e. about 25 days after the incident. The incident happened all of a sudden in a heat of passion without premeditation and the prosecution has not been able to establish that the accused assaulted the deceased with intention to cause her death. Therefore, offence against the accused does not travel beyond Section 304 Part-II of the I.P.C.

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

On the other hand, Mr Gwalre, learned Deputy Govt. Advocate supported the judgment of the trial Court and argued that the manner in which the accused stabbed the deceased with the knife and as a result of which spleen and diaphragm were damaged shows the intention of the accused to commit the murder of Bharti.

In order to appreciate the arguments advanced by respective counsel, we have perused the evidence. It has come in the dying declaration (Ex.P-25) made by deceased Bharti before D.K. Sinha (PW-6), the Investigating Officer, that on the day of incident she was residing in her parental house and on that day when she was returning from her duty, on the way, accused Kailash, husband of the deceased, met her and asked her to go along with him to his house, which she refused and she came to her house. The accused followed her, entered in her room and again asked her as to whether she will go along with him or not to his house on which deceased Bharti said that she is not going to reside with him. At that time, main door of the house was knocked by mother of the deceased, when the deceased tried to move towards the door to open it, the accused pushed her, caught hold of her by one hand and attacked her with the knife 5-6 times with the other hand. Thereafter, hearing her screams, Raja came and she became unconscious.

This statement of the deceased shows that the accused was persuading the deceased to accompany him to reside with him, which was refused by deceased Bharti. In the mean time, mother of the deceased knocked main door of the house, when the deceased moved towards that door to open it, the accused attacked her with the knife. The above fact shows that when Bharti

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश - 7 -	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

blatantly refused the accused to accompany him to his house, the accused felt frustrated and in a heat of passion, he attacked the deceased with the knife. Initially he was persuading the deceased to accompany him.

Therefore, it cannot be inferred from the above facts that the accused came prepared to attack the deceased. In fact, he was requesting deceased Bharti, his wife, to accompany him to his house, when she refused and in that process when the mother of the deceased knocked the door, it infuriated the accused and he attacked the deceased. Moreover, the deceased died after 25 days of the injuries inflicted by the accused. All these circumstances show that the case of the accused is covered by Exception 4 to Section 300 of the I.P.C., as such, he is liable to be convicted under Section 304 Part-II of the I.P.C.

In the result, the appeal is partly allowed. While setting aside conviction and sentence imposed upon the accused under Section 302 of the I.P.C., he is convicted under Section 304 Part-II of the I.P.C. and sentenced to undergo R.I. for ten years. It is stated that the accused is in detention since 4-12-1998 till date. Therefore, the accused shall be entitled for set-off of the above period against the sentence imposed upon him.

Sd/-
Ag. Chief Justice

Sd/-
Sunil Kumar Sinha
Judge

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